Supreme Court, U.S.
FILED

95 207 AUG 04 1995

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 199

CLIFFORD C. MEADOWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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July 1995

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QUESTION PRESENTED

The government's use at trial of a lease agreement which differed from that which had been offered during the Article 32, U.C.M.J., 10 U.S.C.A. § 832, Investigation unfairly misled the defense and thereby denied petitioner a fair opportunity to present a defense.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Clifford C. Meadows, respectively prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in this case on June 12, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 42 M.J. 132 (1995) (Appendix A). The unpublished opinion of the United States Air Force Court of Military Review, issued on July 6, 1993 is attached (Appendix B).

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on June 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (West Supp. 1994) and 10 U.S.C.A. § 867(a) (West Supp. 1994).

STATEMENT OF THE CASE

The petitioner was convicted of stealing $1,600.66 between January and June 1991 from the United States by obtaining overseas housing allowance payments under false pretenses. Petitioner was also convicted of soliciting a witness to make a false official statement.

The theft charge was based on petitioner's January 22, 1991 submission of an AF Form 2367 (Individual Overseas Housing Allowance Report) along with a lease agreement which reflected a landlord-tenant relationship between Wendy Watson and Petitioner to the base housing office at RAF Lakenheath, United Kingdom. The monthly rent specified in the agreement was £325.

As appellant's trial defense counsel points out in the Allegation of Error and Petition for Clemency dated 11 February 1992, the defense was provided with copies of the lease agreement during pretrial discovery and at the Article 32, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C.A. § 832 (West 1983), [hereinafter, Article 32], Investigation. As there was no issue as to whether petitioner had in fact executed the document, or whether he had submitted it to the housing office with the AF Form 2367, the defense did not object to the investigating officer's Exhibit 3.

At trial, the government called two witnesses to authenticate a lease agreement designated Prosecution Exhibit 2. This exhibit was not shown to the defense counsel when offered and the defense counsel indicated he had no objections without even looking at the document. (R. at 73). As petitioner's trial counsel also outlines in his post-trial Allegation of Errors, Ms. Shelia Tollman of the housing office at Lakenheath testified that Prosecution Exhibit 2 was *a* lease agreement of the type provided by her office. (R. at 49). She was unable to be more specific. (R. at 50). Later in the government's case, Wendy Watson also identified Prosecution Exhibit 2, and testified that it was *the* agreement she had signed

with petitioner on January 17, 1991. (R. at 73). There was no objection to the exhibit because, again, there was no debate that petitioner had executed a lease with Ms. Watson and submitted it to the housing office; and it was defense's understanding that this was exactly the same exhibit submitted at the Article 32 Investigation. The defense's position was that the submission had been accurate and honest. Further, there was no reason for petitioner or his trial counsel to suspect that Prosecution Exhibit 2 was not the same document that had been provided to them at two previous stages of the proceedings and was the one submitted to the housing office.

During cross examination, Ms. Watson was asked who had filled in the amount of the monthly rent. (R. at 98-99). Her answers differed from those she had given to similar questions at the Article 32 Investigation (*see* allied papers—I.O. Exhibit 13), and from those petitioner gave when he testified (R. at 120).

The entire thrust of the defense's case was that Wendy Watson was not telling the truth about her agreement with petitioner because she was upset that petitioner had broken off their planned marriage and that if the Department of Social Services had become aware of the true nature of the lease agreement she would be required to pay back previously paid benefits. (*See* R. at 45-47, 88-89, 97, 173-178).

REASON FOR GRANTING THE WRIT

THE GOVERNMENT'S USE AT TRIAL OF A LEASE AGREEMENT WHICH DIFFERED FROM THAT WHICH HAD BEEN OFFERED DURING THE ARTICLE 32, U.C.M.J., 10 U.S.C.A. § 832, INVESTIGATION UNFAIRLY MISLED THE DEFENSE AND THEREBY DENIED PETITIONER A FAIR OPPORTUNITY TO PRESENT A DEFENSE.

Discovery in the military justice system has for some time been more open and extensive than that in civilian criminal proceedings. Both the Uniform Code of Mili-

tary Justice and the Manual for Courts-Martial specifically provide that both the defense and the prosecution will have an "adequate opportunity" to prepare its case and an "equal opportunity" to examine the evidence. Article 46, U.C.M.J., 10 U.S.C.A. § 846 (West 1983) [hereinafter Article 46]; Rule for Courts-Martial 701(e).

While we have no basis to suggest that the substitution of Prosecution Exhibit 2 for Investigating Officer's Exhibit 3 was intentional,[1] the impact on petitioner's opportunity to present a meaningful defense was no less. In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 88. In *United States v. Bagley*, 473 U.S. 667 (1985), this Court provided the standard for assessing a prosecutor's failure to disclose appropriate information.[2] The Court in *Bagley* stated reversal is mandated when the information that was not disclosed is "material."[3] The court went on to say that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

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[1] While I have no evidence to the contrary, I am troubled by how this substitution could have occurred. Clearly if evidence existed that a knowing fraud was committed upon the court the standard of review would be different. The only manner by which to resolve these unanswered questions would be through a *Dubay* hearing. *United States v. Dubay*, 37 C.M.R. 411 (U.S.C.M.A. 1967).

[2] The standard outlined in *Bagley* is a departure from the review standard previously formulated by the Court in *United States v. Argus*, 427 U.S. 97 (1976). In *Argus* the Court had announced a three part evaluation which differed depending on the nature of the defense's discovery request.

[3] This standard removed to a great extent the distinction predicated on whether the defense had made a discovery request or not. In this case the allied papers do not contain a discovery request.

the proceedings would have been different. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. *See also United States v. Green*, 37 M.J. 88 (C.M.A. 1993).

The standards outlined in *Brady* and *Bagley* raise two issues with regard to this case. First was the existence of a second original of the lease agreement "favorable information" mandating disclosure?[4] Secondly, did the failure to disclose "materially" affect the outcome of the subject case?

As for the first issue, petitioner would contend that while the existence of a second original lease does not strictly fall into the category of information requiring disclosure,[5] it should none the less be entitled to the protections outlined and required by *Brady* for several reasons. First, the evidence in question was different than that disclosed to the defense at the Article 32, *supra*, Investigation. It is well established that one of the principle purposes of an Article 32, *supra*, Investigation is to provide the accused an opportunity for discovery. *United States v. Brammel*, 29 M.J. 958 (A.C.M.R. 1990); *United States v. Chapel*, 15 M.J. 537 (A.F.C.M.R. 1982). To allow the prosecution to substitute evidence offered at the Article 32, *supra*, with new evidence at the trial, without disclosure to the defense, would be inconsistent with the stated purpose of the Article 32, *supra*, Investigation.

Second, while in this case the second original lease was inculpatory it was substituted for evidence that was exculpatory. Under the defense's theory of the case, the accused and Ms. Watson were living together as common

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[4] This Court in *Bagley*, fn. 7, *infra*, highlights that *Brady* does not create a broad constitutionally required right of discovery.

[5] This Court has limited the *Brady* protection to "evidence favorable to accused," *Bagley*, 473 U.S. at 676, and to "impeachment evidence" *Giglio v. United States*, 405 U.S. 150, 154 (1972).

law man and wife. This status made it understandable why, despite the existence of a lease for the payment of rent, rent in fact did not actually change hands but only constructively changed hands. In support of this theory, defense confirmed at the Article 32, *supra,* Investigation that Ms. Watson completed the lease and filled in all the blocks. (*See* Allied Papers). Defense sought to advance this same theory of their case at the trial but were thwarted by the prosecution's substitution of the lease. To allow the prosecution to substitute inculpatory evidence for exculpatory evidence when the documents are nearly identical without notifying defense undermines the spirit if not the requirements of *Brady.*

Finally, in *United States v. Eshalomi,* 23 M.J. 12 (C.M.A. 1986) that court noted that "Congress intended more generous discovery to be available for military accused." *Id.* at 24; *see* Article 46, *supra.* This generous discovery is meaningless if the prosecution can substitute apparently identical inculpatory evidence for exculpatory evidence previously provided to the defense without notice.

As for the issue of materiality, while this is a decision that is fact specific, the United States Court of Appeals for the Armed Forces has noted the ". . . benefit of any reasonable doubt . . ." will be given to the accused when applying the materiality test because of the generous discovery afforded counsel in a court-martial. *Green,* 37 M.J. at 90; *see* Article 46, *supra.* In this case, this misleading information undermined the defense's case in two respects. First, the change undermined the substance of the defense's theory. Since Ms. Watson denied completing the lease it was more difficult for the defense to argue that Ms. Watson was a knowing participant in the constructive lease payment arrangement.[6] Second the

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[6] It is highly probable that the defense was misled in the case, and their preparation for the trial, by the government's use of the initial original lease at the Article 32 Investigation. The fact that no one disputed the validity of that lease at any time prior to

change undermined his credibility as a witness. His testimony was directly at odds with Ms. Watson and this inconsistency undermined his credibility as a witness. As noted by the closing argument of both counsel, these two areas, the nature of the relationship and the credibility of the witness, were the critical issues in the case. The substituted evidence in the case went to both of the issues and was thus clearly material.

CONCLUSION

The substitution of the central item of documentary evidence against petitioner directly affected his ability to present a defense to the primary charge against him. The petitioner respectfully requests, that this Honorable Court grant the petition for a writ of certiorari and remand this case to the United States Court of Appeals with an order to set aside the findings and sentence, or in the alternative, order that a *Dubay* hearing be conducted to resolve the factual questions raised by this issue.

Respectfully submitted,

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trial only reinforced the defense's belief that it was only lease and that it was unnecessary for them to conduct further investigation in this area.